(2)

No. 91-683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CITY OF JAMESTOWN, being represented by its Mayor, STONEY C. DUNCAN, and its Aldermen, BOB BOW, HAROLD WHITED, CORDIS TAUBERT, MARK CHOATE and CAIN CHOATE,

Petitioner,

v.

JAMES CABLE PARTNERS, L.P., a Delaware Limited Partnership d/b/a BIG SOUTH FORK CABLEVISION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

BURT A. BRAVERMAN
Counsel of Record
FRANCES J. CHETWYND
TIMOTHY R. FURR
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750

ERNEST A. PETROFF
T. LESLIE DOOLEY
BAKER, WORTHINGTON,
CROSSLEY,
STANSBERRY & WOOLF
3 Courthouse Square
Huntsville, Tennessee 37756
(615) 663-2321

Attorneys for Respondent

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The Respondent, James Cable Partners, L.P., d/b/a Big South Fork Cablevision, respectfully requests that the Court deny the petition for writ of certiorari, which seeks review of the March 22, 1991 judgment and opinion of the Tennessee Court of Appeals, and the June 24, 1991 *per curiam* order of the Supreme Court of Tennessee denying Petitioner's application for permission to appeal. The decisions and orders of the courts below are not officially reported.

STATEMENT OF THE CASE

James Cable Partners, L.P., doing business as Big South Fork Cablevision ("James"), the plaintiff below, owns and operates a cable television system in Jamestown, Tennessee, pursuant to an exclusive franchise granted by the City

of Jamestown, Tennessee ("the City"), the defendant below. This action was commenced in response to the City's grant to itself of a second franchise and its construction of a second cable television system in derogation of the terms of James' franchise. The action arose as follows.

On March 14, 1977, the City passed Ordinance No. I pursuant to the Cable Television Act of 1977, Tennessee Code Annotated Section 7-59-101, *et seq.*, granting to Clarence Harding, *et al.*, one of James' predecessors in interest,

> the *exclusive* right to erect, maintain, operate and utilize facilities for the operation of communications systems and additions thereto, in the streets of the City for a period of 25 years, in accordance with the applicable laws and regulations of the United States of America and the State of Tennessee, and the Charter, regulatory ordinances and regulations of the City.

Ordinance No. I (Tr. Ex.[1] 1), section 1 (emphasis added); see Pet. App. at 11.

In exchange for the grant of the exclusive franchise, the cable company, among other things, agreed to erect such facilities as are required for operation of a cable television system; to relocate such facilities from time to time, at its own expense, as necessitated by local street conditions; to provide cable television services to the citizens of Jamestown; to maintain a local office; to indemnify, protect and save harmless the City from all loss or damage arising out of operation of the cable company and grant of the franchise; to post a bond; and to carry insurance to protect the parties against all claims arising out of the construction and operation of the system. Ordinance No. I, sections 3-9, 13, 14, 17. The franchise agreement further provided for the City's approval of all changes

[1] "Tr. Ex." references are to the parties' trial exhibits. "R." references are to the trial transcript. "Pet. App." references are to the appendix included in the Petition for Writ of Certiorari.

in rates or charges, and gave the City the right to revoke rights granted by the franchise if the company failed to comply with its conditions. *Id.*, sections 10, 11; see Pet. App. at 16. Finally, Ordinance No. I contained the following severability clause:

> If *any* section, sentence, clause or phrase of the ordinance is for any reason held illegal, invalid, or unconstitutional, such invalidity shall not affect the validity of the ordinance and any portions in conflict are hereby repealed.

Ordinance No. I, section 20 (emphasis added).

In December 1982, the franchise granted by Ordinance No. I was assigned with the City's approval to Mountain Cablevision, Ltd., d/b/a Fentress County Cable TV, and amended to provide for the payment to the City of a franchise fee in the amount of three percent (3%) of the company's gross annual revenues. Ordinance Granting Amendment To Cable Television Agreement, December 20, 1982 (Tr. Ex. 2), paragraph (B). As expressly stated by the City, "[a]ll other provisions of the original Ordinance . . . shall remain unchanged and in full force and effect." *Id.*, paragraph (J). The franchise was next transferred in December 1984 to Paradigm Communications, Inc., James' immediate predecessor in interest. Again, the City consented to assignment of the entire franchise. Consent To Assignment, December 10, 1984 (Tr. Ex. 3), sections 2, 3.

In June 1988, the franchise was assigned by Paradigm to James. Written consent and approval of the City to the transfer were reflected in a Memorandum of Agreement, in which the City twice confirmed that all provisions of the original franchise remained valid and "in full force and effect." Memorandum of Agreement, June 13, 1988 (Tr. Ex. 5), sections 3 and 4; see Pet. App. at 12. In consideration of the City's consent to the assignment, James agreed to a two percent (2%) increase in the franchise fee to be paid to the City, raising the fee to five percent (5%) of the cable company's gross annual revenues. Memorandum of Agreement, section 5; see Pet. App. at 12-13.

In January 1990, the City, for the first time, took the position that James' franchise was no longer exclusive in nature, and granted itself a franchise to operate a cable television system in Jamestown. Ordinance of the City of Jamestown, January 8, 1990 (Tr. Ex. 7). The City thereafter built and began operating its system. Such actions were taken in direct contravention of James' exclusive right to operate a cable television system in Jamestown during the term of Ordinance No. I. Significantly, prior to granting itself a franchise, the City never gave any indication to James that it did not consider James' franchise to be exclusive (R. 67-76), and indeed never raised the issue of exclusivity when it approved assignment of the franchise to James or in its negotiations with James. Tr. Exs. 10-12; R. 73, 85.

It was undisputed below that an exclusive franchise existed at least until 1984, when the Cable Communications Policy Act of 1984 (the "Cable Act"), 47 U.S.C. § 521, *et seq.*, was passed by Congress. Defendant's Answer to Complaint, paragraph 3. It was further undisputed that the franchise continued thereafter to fully exist to the extent it was not preempted by the Cable Act. *Id.* However, the City argued that James lost its exclusive franchise with the Act's passage in 1984 because the Act, in providing that cities could not regulate basic cable television rates in certain circumstances, took from the City the essence of its bargain and entitled the City to abrogate the exclusivity provision of Ordinance No. I.[2]

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[2] Congress' partial preemption of local regulation of rates for basic cable television service was not without warning to municipalities such as the City of Jamestown. Prior to the City's award of Ordinance No. I in 1977, the Federal Communications Commission ("FCC") had already preempted local rate regulation of "premium" cable television services, *see In the Matter of Clarification of the Cable Television Rules*, 46 F.C.C.2d 175, 199-200 (1974); *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979), and announced that it was reexamining the extent to which cities would be permitted to regulate rates for basic cable services, *see In the Matter of Inquiry into the Manner in Which Cable Television Regular Sub-*

In advancing this argument, the City relied primarily upon the following two sections of the Cable Act: Section 621(a)(1), 47 U.S.C. § 541(a)(1) (Supp. 1990), which provides that "[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction;" and Section 623, 47 U.S.C. § 543 (Supp. 1990), which provides in pertinent part:

> (a) . . .Any franchising authority may regulate the rates or the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.
>
> (b)(l) . . .[T]he [Federal Communications] Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition.
>
> * * *
>
> (2) For purposes of rate regulation under this subsection, such regulations shall—
>
> (A) define the circumstances in which a cable system is not subject to effective competition; and
>
> (B) establish standards for such rate regulation.
>
> (3) The Commission shall periodically review such regulations, taking into account developments and technology, and may amend such regulations,

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scriber Rates are Established, 58 F.C.C.2d 915, 916 (1976); *In the Matter of Amendment of Subpart C of Part 76 of the Commission's Rules and Regulations Regarding the Regulation of Cable Television System Regular Subscriber Rates*, 60 F.C.C.2d 672, 683 (1976). Thus, in entering into the franchise agreement in 1977, and in approving its assignment on three occasions thereafter, the City knew or reasonably should have known that Congress or the FCC could, at any time, change the circumstances under which basic rates could be regulated or do away with rate regulation altogether.

> consistent with paragraphs (1) and (2), to the extent the Commission determines necessary.

The definition of "effective competition" and the standards for rate regulation are determined by rules issued by the Federal Communications Commission ("FCC"). At the time of the proceedings below, the FCC had determined that effective competition was present where three television broadcast signals were viewable in a community through off-the-air reception. *See* 47 C.F.R. § 76.33 (1990). Because at least three signals were viewable in Jamestown, the effective competition regulations had the effect of suspending regulation by the City of rates for basic cable service. However, the Cable Act provided that the effective competition standard was to be subject to periodic review and revision by the FCC. *See* 47 U.S.C. § 543(b)(3) (Supp. 1990).

In response to the City's grant to itself of a franchise, James commenced a declaratory judgment action in the Chancery Court for Fentress County, Tennessee, seeking a declaration of the parties' rights under Ordinance No. I. The trial court held that Section 621 of the Cable Act, 47 U.S.C. § 541 (Supp. 1990), did not prohibit exclusive franchises or preempt exclusive franchises that preexisted the Act's passage; therefore, any exclusive right to own and operate a cable system granted before enactment of the Cable Act remained valid under Section 621 after passage of the Act. Pet. App. at 24. However, the trial court held that, with the enactment of Section 623, 47 U.S.C. § 543 (Supp. 1990), which took away the City's ability to regulate rates for basic cable services, a failure of consideration as to the exclusivity provision of the franchise occurred. Finding that the City's ability to regulate cable rates was the sole consideration for the City's grant of an exclusive franchise in 1977, and that under the Act the City presently did not have the ability to regulate rates, the court ruled that the exclusivity provision of the franchise should be rescinded. Pet. App. at 24.

On cross appeals, the court of appeals reversed. First, the court looked at the Cable Act as a whole and determined that the grant of an exclusive franchise was not inconsistent with, or preempted by, the terms of the Act. Pet. App. at 6-10. Noting that "the Act specifically authorizes one *or* more franchises," the court of appeals stated: "It is hard for us to conceptualize the grant of an exclusive franchise being *inconsistent* with the import of this language." Pet. App. at 9. Considering Section 637 of the Act, the court of appeals further observed: "The Act also contains a provision that clearly enumerates the legislative intention to give existing franchises their full force and effect," including exclusive franchises. Pet. App. at 9. The court of appeals concluded that "to hold otherwise would be to extend or contradict the import of the language contained in this Act." Pet. App. at 10.

Second, the court of appeals ruled that the City's present inability to regulate cable television rates did not, under Tennessee law, result in a failure of consideration sufficient to rescind James' exclusive franchise. Applying the rule that a contract could be rescinded for a failure of consideration *only* if the consideration was such an essential part of the contract that its failure would defeat the very object of the contract or concerned a matter of such grave importance that the contract would not have been executed had that default been contemplated, the court of appeals observed that the franchise imposed on James no fewer than nine continuing obligations (Pet. App. at 16; see discussion at pp. 2-3, *supra*), and that there was "no indication that the City's ability to regulate rates was of such grave importance that the franchise would not have been contemplated without the inclusion of such." Pet. App. at 17.[3] The court concluded that rescission was

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[3] Had the City felt that the power to regulate rates during the entire term of the franchise was an essential predicate to its grant of an exclusive right to operate a cable system, it could have provided in the franchise for termination of the exclusive right in the event that its ability to regulate rates ceased. In fact, the City did expressly provide for termination of the franchise under certain conditions (see Ordinance

not warranted because there had not been a total failure of consideration and because the temporary preemption of local regulation of basic cable rates,[4] which was only one part of the consideration for the parties' contract, had not defeated the principal object or purpose of the agreement, the provision of cable television service by James. Pet. App. at 15-17.[5]

The City then filed an application with the Supreme Court of Tennessee for permission to appeal from the court of appeals' decision. The City's application was denied by *per curiam* order dated June 24, 1991. See Pet. App. at 1.

REASONS FOR DENYING THE PETITION

In 1977, the City of Jamestown issued a franchise to James' predecessor, authorizing it to construct and operate a cable television system. In return for the cable operator's promise to spend substantial sums of money to build the system, to provide service to the community and to be subject to a variety of municipal regulations, James' predecessor was given the *exclusive* right to use the City's streets for purposes of operating a cable system. James' purchase of the system for $1,400,000 and its improvement of the system for an additional $850,000 were based significantly, as were its predecessors' actions, on the City's

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No. I, sections 3, 11, 13), but it did not include the cessation of rate regulation among those conditions. Moreover, the severability clause (Ordinance No. I, section 20) manifested the parties' intent that the agreement would remain otherwise fully effective even if the rate regulation provision were to become unenforceable.

[4] See Pet. App. at 4 n.2, 9 n.5 and 13 n.7, and accompanying text.

[5] The court of appeals also rejected the City's claims that James' exclusive franchise constituted an illegal monopoly under Tennessee law (Pet. App. at 17-18), and that the City was authorized to operate a cable system in defiance of Ordinance No. I pursuant to a private act of the state legislature, Private Chapter No. 138 of the Private Acts of 1990 (Pet. App. at 18-22). The validity of these holdings, as well as the court of appeals' conclusion that there had not been a partial rescission of the franchise, are purely state law issues that are not reviewable by this Court. *See Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933); *Kingsley International Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 688 (1959).

contractual assurance that the system would retain the exclusive right to provide cable television service to the community and thereby to recoup its investment." R. 78. That assurance was repeated in writing by the City on no fewer than three occasions over a period of eleven years, including the assignment of the franchise to James in 1988, at which time the City ratified the terms of the original exclusive franchise and confirmed that it continued to be "in full force and effect." Tr. Exs. 3, 5, 6.

In 1990, perhaps seeing cable television as a means of supplementing declining municipal revenues or augmenting local political power,[6] the City issued itself a franchise and entered into the cable television business, reneging on the deal that it had struck with James and James' predecessors. The City defended its breach of James' franchise contract by conjuring up an argument that federal preemption had resulted in partial rescission of the contract, a claim never so much as mentioned by the City in the five years that the Cable Act had then been in effect or in the one and one-half years since the City had ratified James' franchise in its entirety.

The Tennessee Court of Appeals saw the true colors of the City's conduct, holding that the Cable Act did not preempt exclusive franchises, and that Congress' partial deregulation of cable television rates by local governments such as the City of Jamestown had not resulted in a partial rescission of James' franchise.[7] In the final result, the

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[6] The City provides no record citation for, and the record does not support, its claims that James Cable and its predecessors "sharply raised the rates" after the Cable Act's passage (Pet. at 6), that James was "unresponsive" to local needs (Pet. at 14), or that there was any interest of city residents in, let alone "demands" for, a municipal cable system (Pet. at 6).

[7] The court of appeals' opinion is in accord with the decisions of other courts that have held, where local rate regulation provisions in franchises have been found to be unenforceable due to enactment of the Cable Act, that such provisions are fully severable from all other parts of the franchise and that all remaining contractual rights and obligations continue in full force and effect. *See, e.g., Cox Cable San Diego, Inc.*

court of appeals treated this as a matter of contract; the City had entered into an agreement, which it was required to honor. The Supreme Court of Tennessee thereafter denied the City's application for review.

The court of appeals' decision was not only correct, it was prescient. On October 25, 1991, amendments to the FCC's regulations came into effect under which, as pertinent here, effective competition is not deemed to exist in a community, and the cable system's basic service rates are not free from local regulation, unless there are at least six television broadcast signals viewable in the community through off-the-air reception. *See* 47 C.F.R. § 76.33 (1991), *as amended by In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 F.C.C. Rcd. 4545 (1991). Because there are fewer than six signals viewable in Jamestown, the result of this revision is that the City's power to regulate James' basic cable rates, which was temporarily suspended in 1984, has been restored. Thus, the cornerstone of the City's claim that the consideration for James' exclusive franchise had failed and that the City must be allowed to compete in order to provide "an alternative to James Cable's *unregulated* rates" (Pet. at 6) (emphasis added) has crumbled.

Notwithstanding the restoration of its power to regulate James' basic cable rates, the City continues in its quest to evade its contractual obligations and to abrogate James' exclusive franchise. Renewing its federal preemption argument, and invoking for the first time a First Amendment claim never uttered below, the City would have this Court believe that the Court of Appeals' decision wrongly decides a question of federal law that is of widespread importance and that implicates constitutional freedoms. It does none of these.

As we explain below, (1) the petition fails to satisfy the requirements of 28 U.S.C. § 1257(a), which governs the

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v. City of San Diego, 188 Cal. App. 3d 952, 233 Cal. Rptr. 735, 743 (1987).

certiorari jurisdiction of this Court; (2) the court of appeals correctly construed the Cable Act in holding that Congress' partial preemption of local rate regulation did not result in rescission of the exclusivity provision of James' franchise; and (3) review of the decision below is unwarranted, given the virtually unique factual circumstances underlying this case and the resulting limited precedential or practical importance of the issues presented. Accordingly, the petition for writ of certiorari should be denied, and the City should finally be made to abide by its contractual undertakings.

I. THE COURT LACKS JURISDICTION OVER THIS ACTION

Under 28 U.S.C. § 1257(a), there are only three bases upon which this Court may exercise certiorari jurisdiction to review the final judgment of a state court: (1) "where the validity of a treaty or statute of the United States is drawn in question;" (2) "where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States;" or (3) "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. § 1257(a) (Supp. 1991).

The City has failed to demonstrate in its Petition, and cannot show, the existence of any of these exclusive bases for the exercise of certiorari jurisdiction in this case.

A. The Judgment Below Does Not Draw In Question The Validity Of A Statute Or Treaty Of The United States

The judgment of the court below does not draw in question the validity of a statute or treaty of the United States. This prong of Section 1257(a) is not implicated unless the power of Congress to enact the statute or treaty in question has been directly inquired into by the state court. *Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210, 224 (1889) ("Whenever the power to enact a statute . . .

is fairly open to denial . . ., the validity of such statute is drawn in question, but not otherwise.") It is not sufficient for purposes of this prong of Section 1257(a) that the state court merely construed the federal statute so as to deny a claim thereunder, or that it viewed the facts so as to place the litigant outside the scope of federal law. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 289-90 (1958) (mere "construction" of federal statute, as opposed to "holding of unconstitutionality," provides no basis for invoking this prong of the jurisdictional statute.)

In this case, the Tennessee Court of Appeals did not question Congress' power or authority to enact the Cable Act, but rather simply found that the Cable Act "clearly and unambiguously" was not intended "to preempt or prohibit" exclusive franchises of the type granted by the City to James. See Pet. App. at 6. Thus, the judgment of the court below does not "draw in question" the "validity" of the Cable Act, and therefore jurisdiction to review that ruling cannot be predicated on this prong of 28 U.S.C. § 1257(a).

B. The Judgment Below Does Not Draw In Question The Validity Of A State Statute As Being Repugnant To Federal Law

Section 1257(a) also provides for review of the final judgment of a state court "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States." 28 U.S.C. § 1257(a) (Supp. 1991). The City cannot invoke this prong of Section 1257(a) because Ordinance No. I is not a "statute of any State" within the meaning of Section 1257(a).

Although the phrase "a statute of any State," as used in Section 1257(a), has been construed to include a municipal ordinance,[8] an ordinance will be deemed to be a

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[8] *See, e.g., Coates v. Cincinnati*, 402 U.S. 611, 612 (1971) (entertaining First Amendment challenge to municipal ordinance regulating assemblages of persons on sidewalks).

state "statute" for purposes of Section 1257(a) only if it is a "legislative"—as opposed to contractual—action. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 42 (1983);[9] *Lathrop v. Donohue*, 367 U.S. 820, 824-27 (1961). An ordinance may be considered a "legislative action" if it exhibits the characteristics of legislation—i.e., if it is a "*unilateral* promulgation of a rule with continuing legal effect." *Perry Education Association*, 460 U.S. at 42 (emphasis added).

In contrast, where a municipality has entered into an agreement with a private party that is, in its essential characteristics, a bilateral contract between the parties, such an agreement cannot subsequently be characterized as a "State statute" for the purpose of invoking the jurisdiction of this Court.

> [A] [contractual] agreement [between a governmental body and a private party] is not unilaterally adopted by a lawmaking body; it emerges from negotiation and requires the approval of both parties to the agreement. Not every government action which has the effect of law is legislative action . . . [S]tatutes authorizing appeals are to be strictly construed, *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n. 1 (1970). . . .

Perry Education Association, 460 U.S. at 42-43.

Here, the franchise on which the City casts its jurisdictional focus is in essence a bilateral contract between the City and James Cable,[10] negotiated by the parties and supported by the exchange of mutual promises and con-

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[9] In *Perry Education Association*, the Court analyzed this issue in the closely related context of whether a collective bargaining contract entered into by the government constituted a "State statute" for purposes of invoking the Court's jurisdiction under the version of 28 U.S.C § 1254 then in effect. The Court found that it did not. 460 U.S. at 42-43.

[10] *See, e.g., Texarkana v. Arkansas Louisiana Gas Co.*, 306 U.S. 188, 199-200 (1939) (utility franchise is a contract); *see also* McQuillin, Municipal Corporations, § 34.06 at n.1 (3rd ed. 1986).

sideration. The franchise bears none of the trappings of a "legislative action" of general applicability, and undeniably is not a "unilateral promulgation" of a rule of general applicability. *Id.*[11] Consequently, Ordinance No. I does not constitute "a statute of any State" for purposes of, and the Court does not have jurisdiction to review this case under, this prong of Section 1257(a).

C. There Is No Constitutional Title, Right, Privilege Or Immunity At Issue Here On Which Jurisdiction Can Be Founded

In its Petition, the City seeks for the first time to place a First Amendment gloss on this contract dispute. The effort must fail for two reasons.

First, as explained at greater length below, the City has no substantive First Amendment claim on which certiorari jurisdiction can be founded. See pp. 26-28, *infra*. It would strain constitutional logic if the City, having issued this exclusive franchise, were now permitted to assert a deprivation of First Amendment rights against itself as both victim and state actor. In addition, to the extent that, *arguendo*, the City may be deemed to be a potential First Amendment speaker, it contractually forsook such rights when it voluntarily entered into an exclusive franchise with James and its predecessors. Moreover, having agreed upon an exclusive franchise and induced James and its predecessors to rely on that agreement, the City is estopped from now repudiating the bargain on the ground that it could perhaps suffer from an asserted constitutional infirmity.

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[11] This fundamental distinction between "enforcement of a limited contractual provision" in a franchise agreement and a comprehensive legislative or regulatory scheme of general applicability has been held to be "dispositive" of the issue of jurisdiction based on a claim of federal preemption in other federal question jurisdiction contexts. *See Nashoba Communications Limited Partnership v. Town of Danvers*, 893 F.2d 435, 440-41 (1st Cir. 1990) (noting that franchise agreement is "not regulation" but rather merely "a contractual commitment" stemming from the language of the agreement).

Second, even if the City did have a substantive First Amendment claim to assert, it clearly has waived any such claim by failing to timely and properly raise the issue in the Tennessee courts. " 'The Court has consistently refused to decide federal constitutional questions raised here for the first time on review of state court decisions.' " *Webb v. Webb*, 451 U.S. 493, 499 (1981), *quoting Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).[12] Indeed, this Court ordinarily will not review *any* question not raised below, even those arising from the federal courts where considerations of federal-state comity are not implicated. *Youakim v. Miller*, 425 U.S. 231 (1976); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). " 'It is generally only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.' " *Youakim v. Miller*, 425 U.S. at 234, *quoting Duignan v. United States*, 274 U.S. 195, 200 (1927); *see, e.g., Pollard v. United States*, 352 U.S. 354 (1957) (permitting criminal defendant who had not had lawyer below to raise federal question before the Supreme Court).

Here, the City failed to raise, or indeed even utter any mention of, its First Amendment claim in the courts below. It therefore must be deemed to have waived the issue. In light of the City's inability to satisfy this or the other prongs of 28 U.S.C. § 1257, James submits that the Court is without jurisdiction to review this case.

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[12] This principle is well-settled and is codified in Supreme Court Rule 14(h):

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

II. THE LOWER COURT CORRECTLY HELD THAT THE CABLE ACT DOES NOT PREEMPT EXCLUSIVE FRANCHISES

The City asserts that the Tennessee Court of Appeals erred in holding that exclusive franchises were not preempted by the Cable Act. Determination of this issue turns on the interpretation of Sections 621, 636 and 637 of the Cable Act, 47 U.S.C. §§ 541, 556 and 557 (Supp. 1990). These provisions, together with the Act's legislative history and subsequent judicial and administrative opinions, confirm that the Cable Act preserved rather than preempted preexisting exclusive cable television franchises.

Section 621(a)(l) provides that

> [a] franchising authority may award, in accordance with the provisions of this title, *1 or more* franchises within its jurisdiction.

47 U.S.C. § 541(a)(1) (Supp. 1990) (emphasis added). Significantly, this section of the Act invests franchising authorities with discretion to determine whether they will grant multiple franchises or a single franchise and, if a single franchise, whether it will be exclusive.

Section 636(c) provides:

> *Except as provided in Section 637,* any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is *inconsistent* with this Act shall be deemed to be preempted and superseded.

47 U.S.C. § 556(c) (Supp. 1990) (emphasis added). Under this section, it is only those provisions of franchises awarded *after* the effective date of the Cable Act that, if "*inconsistent* with [the] Act shall be deemed to be preempted and superseded." *Id.* Provisions of franchises

that are consistent with the Act are not preempted, and provisions of preexisting franchises that are inconsistent with the Act are saved by Section 636's reference to the "grandfather" provision of Section 637.

In that regard, Section 637 provides, as pertinent here:

> The provisions of . . . *any franchise in effect on the effective date of this title . . . shall remain in effect*, subject to the express provisions of this title, and for not longer than the then current remaining term of the franchise as such franchise existed on such effective date.

47 U.S.C. § 557(a) (Supp. 1990) (emphasis added). Under Section 637, provisions of *pre*-Act franchises that are inconsistent with the Cable Act are grandfathered for the remaining term of the franchise.

Thus, grant of an exclusive franchise was, and is, entirely consistent with the "1 or more" language of Section 621 and, therefore, is not preempted under Section 636. Moreover, to the extent that, *arguendo*, the exclusivity provision of Ordinance No. I were deemed to be inconsistent with Section 621, it would be grandfathered under Section 637 for the remainder of the franchise term.

The legislative history confirms that Sections 621, 636 and 637 of the Act were not intended to curtail municipalities' existing, or pre-existing, powers to grant a single, exclusive franchise. As stated in the authoritative House Report,[13] Section 621 "grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area." H.R. Rep. No. 934, 98th Cong., 2d Sess. ("H.R. Rep. No. 934") 59 (1984), *reprinted in* 1984 U.S. C.C.A.N. 4655, 4696. The Federal Communications Commission has similarly construed Section 621 as "not re-

[13] The House Report is the official legislative history of the Cable Act, having been adopted by both Chambers. *See* 130 Cong. Rec. S14,285 (daily ed., Oct. 11, 1984); 130 Cong. Rec. H12,235 (daily ed., Oct. 11, 1984).

quir[ing] the franchising authority to grant more than one franchise to service the same community." *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to Provision of Cable Television Service*, 5 F.C.C. Rcd. 362, 366 (1989).

Decisions of a number of courts since the Cable Act's passage are consistent with the construction of the Act allowing for the grant of a single cable television franchise. *See, e.g., Communications Systems, Inc. v. City of Danville, Kentucky*, 880 F.2d 887 (6th Cir. 1989); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 717 (6th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *NorWest Cable Communications v. City of St. Paul*, 3-83 CV 1228 (D. Minn., Sept. l, 1988), *denying J.N.O.V.* (Feb. 27, 1989); *City Communications, Inc. v. City of Detroit*, 685 F. Supp. 160 (E.D. Mich. 1988) (all cases sustaining cities' grant of single franchise or denial of application for second franchise). *See also* Brenner and Price, *CABLE TELEVISION AND OTHER NON-BROADCAST VIDEO LAW AND POLICY*, § 3.02[5] at 3-23 (1986) ("Section 621(a)(1) . . . seemingly legitim[izes] the grant of an exclusive franchise . . . .")

This Court has also apparently recognized that the Cable Act was not intended to divest local governments of their power, in appropriate circumstances, to limit the number of cable television franchises to be granted in a community. In *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), the Court noted that the California Code authorized municipalities "to limit the number of cable television operators in an area by means of a 'franchise or license' system," and that "Congress ha[d] recently endorsed such franchise systems" in enacting the Cable Communications Policy Act of 1984. *Id.* at 490 n.1.

The City suggests that this construction of the Cable Act contradicts Congress' expressly stated purpose to promote competition in cable communications. Pet. at 11-15; *see* 47 U.S.C. § 521(6) (Supp. 1990). Yet, it is inconsistent with neither the express language nor the purpose of the

Act. Although it was a general objective of the Act to promote competition, Congress chose not to disrupt the *status quo* or to divest local communities of their discretion regarding how best to serve local needs and interests. The Act reflects the recognition that there had been and would continue to be instances in which cities would decide for sound reasons that only one operator could, or should, be permitted to use a community's streets to provide cable television service. Congress sought to preserve prior decisions to that effect through the grandfather provision of Section 637, and to ensure through Sections 621 and 636 that cities would continue to have the freedom to decide in the future to award either several franchises, only one franchise, or one exclusive franchise, as the public interest might require. This interpretation reads the several provisions of the Act in harmony by preserving local discretion in individual markets while fostering competition on a national scale.[14]

Federal preemption of a state law may be found to have occurred only in limited circumstances. This Court has described them as follows:

> first, when Congress, in enacting a federal statute, has expressed a *clear* intent to pre-empt state law . . .; second, when it is *clear*, despite the absence of explicit preemptive language, that Congress had intended, by legislating *comprehensively*, to *occupy an entire field of regulation* and

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[14] Other provisions of the Act foster competition and diversity in cable communications. *See, e.g.*, 47 U.S.C. § 532 (Supp. 1990) (requiring cable operators to "designate channel capacity for commercial use by persons unaffiliated with the operator. . ."); 47 U.S.C. § 553 (Supp. 1990) (imposing limitations on ownership of cable facilities and/or provision of cable programming by persons owning other television, telephone or common carrier facilities). Similarly, the FCC has taken additional steps to promote competition both within the cable industry and between cable and other developing technologies. *See, e.g., In the Matter of Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, 5 F.C.C. Rcd. 523 (1989) (addressing competition between cable operators and home satellite dish distributors).

> has thereby "left no room for the States to supplement" federal law . . .; and, finally, when compliance with both state and federal law is *impossible* . . ., or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . ."

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) (citations omitted) (emphasis added).

Here, there is no "clear mandate" (Pet. at 11) in the Cable Act to extinguish all preexisting exclusive franchises. To accomplish so disruptive an objective—one that would abrogate valuable, bargained-for contract rights—Congress would have had to express a clear intent to do so. Yet, if anything is clear from the explicit language of the Act, its legislative history and its interpretation by the courts and the FCC, it is that Congress did not intend to second-guess, and disrupt, the countless franchise decisions that local governments had made prior to passage of the Cable Act.[15] The lower court correctly concluded that the Act did not preempt or supersede preexisting exclusive franchises such as Ordinance No. I.

III. THE PETITION FAILS TO DEMONSTRATE FACTORS WARRANTING THE COURT'S DISCRETIONARY REVIEW OF THIS CASE

Rule 10.1 of the Rules of this Court provides: "A review on writ of certiorari is not a matter of right, but of judicial

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[15] In arguing that the Cable Act "should not be construed to allow exclusive, non-rate regulated cable television franchises to continue in existence after the date of the Act's passage, in communities where the cable television market is not a 'natural monopoly' " (Pet. at 8), the City is asking this Court to do what Congress chose not to, i.e., to adopt a standard different from that which Congress intended to, and did in fact, adopt. If, *arguendo*, rate increases " 'caused concerns in Congress' " (Pet. at 10), or if Congress' preemption of rate regulation has produced an unintended result in those few communities that had previously awarded exclusive franchises, then that is a legislative matter for Congress, not this Court, to address.

discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore." Rule 10.1 further states that, while not controlling, the Court will not exercise its discretion to review the decision of a state court on certiorari unless

> a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals [, . . .] has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10.1(b), (c).

The City contends that this case presents "an important question of federal law, which has not been, but should be, settled by this Court." Pet. at 8. That assertion is based on a gross overstatement of the breadth and importance of the issues of this case, and a misstatement of the suitability of the case for review under the criteria often enumerated by this Court.

A. The Issues Presented By This Case Are Narrow And Of Limited Importance

The City seeks to create the impression that municipal overbuilds of privately owned cable systems are becoming a common phenomenon and that this case therefore raises issues of broad significance. Both the premise and the conclusion are mistaken.

As its premise, the City states that there has been a proliferation of private and municipal cable television systems that "might" compete with existing franchises (Pet. at 8), and that a number of communities are "considering" municipal "overbuilds," i.e., the construction of municipally owned cable systems to compete with existing operators (Pet. at 9). In fact, even if a number of communities have *considered* operating cable systems, few have actually awarded franchises for the construction of municipal sys-

tems, even fewer of those communities have actually built such systems, and the majority of municipal systems built to date have been in communities unserved by another cable operator.

Thus, while the City notes that in July 1989 "there were reportedly ten communities that . . . were considering building rival municipally-owned systems" (Pet. at 9), it fails to note that in October 1990 only two of the ten had actually commenced an overbuild.[16] Similarly, out of the 36 municipalities reported in October 1990 as falling within the loosely defined category of "pending overbuilds," only three had actually moved forward in March 1991.[17] Moreover, out of 62 municipally owned systems nationwide reported to be operating in March 1991, only six were overbuilds of private cable operators.[18] The growth in municipal overbuilds, therefore, could more accurately be described as a trickle rather than a flood.

As to the City's conclusion, even if there were a flood of municipal overbuilds, and even if the Court felt that municipal overbuilds presented issues warranting consideration,[19] this case is not a suitable vehicle for such con-

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[16] Kagan, Cable TV Franchising, Supp. at 2-6 (October 31, 1990) ("Kagan, October 1990").

[17] *Id.*; Kagan, Cable TV Franchising, Supp. at 1-2 (March 25, 1991) ("Kagan, March 1991"). "Pending overbuilds" are defined as including instances where there has been "a second franchise award or inquiry, application pending, city feasibility study, etc." Kagan, October 1990. There are many reasons why a city might make such an inquiry or feasibility study without any intent of actually constructing or operating a municipal system, one of which is merely to put pressure on an incumbent operator to accept changes in an existing franchise.

[18] Kagan, March 1991. The remaining 56 municipal systems were in communities not served by another cable operator.

[19] It apparently does not. This Court recently has denied certiorari in two other cases involving the right of a municipality to operate a competitive cable television system, both of which presented issues of substantially broader applicability and significance than the instant case. In *Warner Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2839 (1991),

sideration. The issues here, as the Tennessee Court of Appeals recognized, are shaped by the exclusivity clause of James' franchise. In contrast, none of the municipal overbuilds to which the City refers involved the overbuild of a private operator who had been granted an *exclusive* franchise. Instead, each involved an incumbent who operated under a *non-exclusive* franchise, so that the municipality was free to proceed with its competitive system, unrestrained by any exclusivity provision. Because the facts of this case are far narrower than, and different from, cases involving non-exclusive franchises, the preemption question raised by the City here has absolutely no relevance to those situations.[20] Moreover, because of the virtually unique factual basis of the ruling below, it poses little threat of interference with the administration, or accomplishment of the statutory aims, of the Cable Act. *Compare, e.g., United States v. Ruzicka*, 329 U.S. 287 (1946) (certiorari granted in case raising "questions of importance in the administration of the Agricultural Marketing Agreement Act . . .").

Nor, as the City asserts (Pet. at 14), does the decision below threaten to have the "practical adverse effect" of

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and *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310 (8th Cir. 1991), *cert. denied*, ___ U.S. ___, 60 U.S.L.W. 3359 (1991), the cities sought to compete with cable television operators to whom they had previously granted *non-exclusive* franchises. Those cases involved considerably different issues, not present here, concerning the First Amendment implications of government ownership and control of a cable television system, the equal protection considerations that arise when a franchising body decides to compete on admittedly unequal terms with a private franchisee that it regulates, and the like. Despite the fact that those issues have been raised in cases before a number of lower courts and have far broader applicability than this case to the operation of cable television systems by municipal governments, the Court denied certiorari in both cases.

[20] The City's references to the *Warner* case (Pet. at 9, 16), cited at note 19, *supra*, are thus inapposite. While that case may have confirmed on *some* grounds a municipality's right to compete with a private cable system, it did not address the situation where, as here, a city contractually agreed that it would not compete with its franchised operator.

making the few of cable systems that operate in rate-deregulated communities pursuant to exclusive franchises less responsive to community needs. For this ignores both marketplace realities and extant federal and local regulations. Congress' rationale for deregulating rates in certain communities was that there were adequate competitive pressures in the marketplace from alternative viewing services[21] to make local *governmental* rate regulation in those communities unnecessary and undesirable. H.R. Rep. No. 934, *supra*, at 25, *reprinted in* 1984 U.S.C.C.A.N. at 4662. With the FCC's recent revision of the "effective competition" rules, the number of instances in which cable operators' rates are free of local governmental regulation are now far more limited than initially envisioned. Moreover, although the Cable Act has temporarily suspended local regulation of basic cable rates in some communities, it declared and reinforced cities' power to pervasively regulate other aspects of cable operators' businesses in areas such as facilities and equipment (47 U.S.C. § 544(b)), consumer protection and customer service (*id.*, § 552(a)(1)), construction schedules and standards (*id.*, § 552(a)(2)), and franchise renewal (*id.*, § 546). Thus, even during the period in which the City of Jamestown's power to regulate James' rates was suspended—which power has now been restored—the City retained ample other powers under Ordinance No. I, including the power of franchise revocation, to regulate James and ensure that James operated in the public interest. See pp. 2-3, *supra*.

In short, review of the decision below is no more necessary than it is appropriate. If the Court were to grant

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[21] *See, e.g., Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984); *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1563 (11th Cir. 1987) (cable systems compete in a product market comprised of, in addition to cable, other video entertainment services such as broadcast television, multipoint multichannel distribution systems ("MMDS"), direct broadcast satellite ("DBS") services, television receive only ("TVRO") services, VCR home movie rentals and movie theaters).

certiorari here, its ruling would be effectively limited to the facts of a very unusual, if not unique, case that is of little precedential or practical import.[22] Whether exclusive franchises "continue to be valid" under the Cable Act is simply neither a "basic" nor an important question (see Pet. at 11) and does not warrant exercise of this Court's limited certiorari jurisdiction. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (particularly in the case of an asserted constitutional question, the Court's "special and important reasons" criterion for exercising certiorari jurisdiction requires that the issue, even if real, be "beyond the academic or the episodic" for the Court to consider hearing the case).

B. The City's Constitutional Claim Is Neither Properly Raised Nor Of Any Moment

Perhaps hoping to add luster to a case that otherwise does not warrant review, the City has sought at this late stage of the litigation to embellish its preemption claim with a First Amendment argument. The City asserts that the lower court's construction of Section 621 of the Cable Act has an unconstitutional result because it does not recognize an "important First Amendment dichotomy" between situations in which a natural monopoly exists (in which circumstances the City concedes that exclusive franchises are permissible) and those in which it does not. Pet. at 16-17. The City's strained, eleventh hour constitutional incantation should be rejected for several reasons.

First, this Court has made clear, since at least as early as *Crowell v. Randell*, 10 Pet. 368, 391-98 (1836), that it is essential to the Court's jurisdiction that a substantial federal question have been properly raised in the state

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[22] *Compare, e.g., Laing v. United States*, 423 U.S. 161, 167 (1976) (certiorari granted to resolve issue affecting seventy pending federal cases); *New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982), and *New York v. O'Neill*, 359 U.S. 1, 3 (1959) (certiorari granted to review state statutes that had identical or substantially similar counterparts in 47 and 35 other states, respectively).

court proceedings. As the Court has stated, there are good policy reasons for this rule:

> Questions not raised in the state court are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system, it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

Cardinale v. Louisiana, 394 U.S. 437, 439 (1969); *see also Illinois v. Gates*, 462 U.S. 213, 218-20 (1983).

The First Amendment issue in this case was raised for the first time in the Petition for Writ of Certiorari. It was not mentioned, in any form or fashion, in any of the City's trial court or appellate papers or arguments. No record was developed below on this issue, and the lower courts were not afforded an opportunity to consider the question. Therefore, even if there were a substantial federal question raised in the Petition, the Court should decline to consider it because it was waived by the City's failure to raise it below. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967) (constitutional objections are waived by failure to raise them at the proper time); *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929) (failure to raise federal question in state court cannot be cured by raising issue for first time in jurisdictional statement or petition for writ of certiorari).

Second, Section 621 of the Cable Act is a general law setting out franchising standards to be followed by local authorities. It does not deal with or target speech or protected expression. As the City's description of the supposed "dichotomy" illustrates, if the lower court's construction of Section 621 impacts First Amendment

rights at all, the impact is indirect and uncertain.[23] Moreover, the development and availability of numerous competitive television services other than cable (see notes 14 and 21, *supra*) ensure that, contrary to the City's claim (Pet. at 17-18), even communities such as Jamestown that are served by a single cable operator under an exclusive franchise will continue to receive a diversity of viewpoints from numerous alternative sources.[24] Thus, the lower court's construction of the Cable Act neither is inconsistent with, nor implicates, the First Amendment.[25]

Third, even if the "First Amendment dichotomy" postulated by the City were real, and even if it could be shown that Jamestown is not a community in which a natural monopoly would develop, that issue is not appropriately before the Court because there is no person who can legitimately complain of any burden to his First Amendment rights. The City is not itself such a person because, to the extent *arguendo* that it had any right as a potential First Amendment speaker, it contractually waived that right when it granted an exclusive franchise.[26]

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[23] The City's claim that exclusive franchises *are* allowable under the First Amendment and Section 621 where there is a natural monopoly (Pet. at 16-17) betrays how indirect and difficult to define any such impact really is. The City does not provide even a hint as to how a court should determine when a natural monopoly exists.

[24] The City's reference to *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), is inapt, since the Court's holdings in those cases were premised on the limited spectrum space that characterizes the broadcast medium, a factor not applicable to cable television.

[25] It is well established that neutral laws of general applicability that are not targeted at expressive conduct do not raise First Amendment concerns even if they have some tangential effect, or impose some incidental burden, on First Amendment rights. *See, e.g., Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456, 2465-67 (1991) (Scalia, J., concurring); *Leathers v. Medlock*, ___ U.S. ___, 111 S.Ct. 1438 (1991); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990).

[26] The Constitution allows a First Amendment speaker to restrict his First Amendment rights by contract and by operation of general laws, such as the Tennessee law of contracts, which allow for the enforcement

Moreover, having bargained for an exclusive franchise and induced James' reliance thereon, the City is estopped from now repudiating that bargain, even on the ground that compliance is inconsistent with its First Amendment rights.[27]

Finally, even if *arguendo* a third party applicant for a franchise might have standing to challenge James' exclusive franchise as an alleged impairment to its asserted First Amendment rights, *see City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (third party challenge to denial of franchise), this case unlike others (see Pet. at 16) does not present that question; for here the record is devoid of any reference to such a third party applicant, and in fact no third party has sought or been denied a franchise. The First Amendment burden therefore is entirely hypothetical and the Court should decline to rule upon it.[28]

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of such promises. *See Cohen v. Cowles Media Co.*, ___ U.S. ___, 111 S.Ct. 2513, 2518-19 (1991) (newspapers that breached their promise not to publish confidential information held liable for damages notwithstanding their claim that the First Amendment barred enforcement of their promises; the restrictions at issue were self-imposed, and any inhibition of First Amendment rights as a result of enforcement of the promises "is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them.").

[27] *Id.; see also, e.g., City of Mt. Vernon v. Berry*, 73 N.E. 515, 518-19 (Ohio 1905) (where city had entered a contract under the terms of an unconstitutional statute and performance had begun, city was estopped from repudiating contract); *Grosserand v. City of Gretna*, 121 So. 208, 211-12 (La. 1928).

[28] The Court has stated that it is not "authorized to answer academic questions. The constitutionality of a statute is not drawn in question except in connection with its application to some person, natural or artificial." *White v. Johnson*, 282 U.S. 367, 373 (1931); *see also Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 70-81 (1961) (the Court will not grant review of constitutional issues that are prematurely raised or grow out of the mere potential impairment of asserted rights under a statute).

C. The City Has Failed To Show That The Decision Below Is In Conflict With The Decisions Of Another State Court Of Last Resort, A Federal Court Of Appeals Or This Court

Review by this Court is not necessary to secure uniformity of decision among the lower courts. Apart from the decision below, the City cites no other case where the federal question raised here has been presented, let alone decided, and certainly no evidence of any direct or material conflict on that issue between the decision below and the decisions of state or federal courts. Nor, save for its attenuated and incurably late First Amendment argument, does the City assert any conflict between the decision below and the decisions of this Court. Under circumstances such as these, the Court has declined to exercise its certiorari jurisdiction. *See, e.g., Lane & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923); *Sanchez v. Borras*, 283 U.S. 798 (1931).

CONCLUSION

Because this case fails to satisfy the requirements of 28 U.S.C. § 1257(a), the Court lacks jurisdiction over the case. Moreover, the City has failed to demonstrate that there are special and important reasons that warrant review of the decision of the court below. Given the factually unique nature of the case, the limited practical and precedential importance of the issues presented, the correctness of the court of appeals' decision, and the absence of any conflict between the lower court's judgment and the decisions of this or any other court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BURT A. BRAVERMAN
Counsel of Record
FRANCES J. CHETWYND
TIMOTHY R. FURR
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750

ERNEST A. PETROFF
T. LESLIE DOOLEY
BAKER, WORTHINGTON, CROSSLEY,
STANSBERRY & WOOLF
3 Courthouse Square
Huntsville, Tennessee 37756
(615) 663-2321

Attorneys for Respondent

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